

IN THE
Supreme Court of the United States

OCTOBER TERM, 1945.

No.

ROBERT A. FISCHER, THE FISCHER COR-
PORATION and A. S. ALOE COMPANY.

Petitioners,

vs.

F. H. BOWERS and LOUIS J. BRISTOW,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI.

Opinion and Judgment of Courts Below.

The motion for summary judgment was based upon the admissions resulting from the failure to deny the requests for admissions and upon the affidavits and exhibits of prior patents presented with the motion. The trial Court granted the motion [Tr. 109-110] on the authority of *Smyth v. Kaufman, et al.*, 114 F. (2d) 40 (C. C. A. 2), and many other cases, stating in its decisions:

"On the whole I am satisfied, under the pleadings, affidavits and admissions, that there is no genuine issue as to any material fact. (Rule 56(c), Federal Rules of Civil Procedure)."

The trial Court ordered stricken from the files those answers to requests for admissions, which answers were filed after the hearing on the motion and without leave of Court, stating that they did not comply with Rule 56(e), Federal Rules of Civil Procedure.

The summary final judgment [Tr. 111-113] recites that the Court considered the pleadings, the requests for admissions,

“* * * the admissions resulting from the failure of plaintiffs to serve upon defendants a sworn statement denying the matters on which admissions were requested”,

the affidavits, and exhibits of prior patents, and continues by holding—

“The Court having found that there is no genuine issue as to any material fact to be submitted to the trial Court”,

whereupon the trial Court held that the patent was invalid and dismissed the complaint with costs. This judgment was dated June 8, 1943.

A timely appeal was filed by plaintiffs below and the Circuit Court of Appeals for the Ninth Circuit rendered an opinion on April 21, 1945. A petition for rehearing was filed and the original opinion was withdrawn and amended by order of June 1, 1945. The amended opinion appears on pages 145 to 154 of the transcript. Only such portions of the opinion as pertain to petitioners Fischer et al., [Tr. 149-154] are under consideration here. The decree of the Circuit Court of Appeals appears on pages 155-156 of the transcript.

Jurisdiction.

The jurisdiction of this Court is invoked under §240(a) of the Judicial Code as amended. The action in this case was a suit under the patent laws, §24(7) of the Judicial Code. The effective date of the judgment and decree of the Circuit Court of Appeals, to which this petition for writ of certiorari is directed, is June 1, 1945.

Statement of the Case.

The facts leading up to the presentation of this petition are stated in the petition and in the first section of this brief.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that whenever issues are drawn by the pleadings, findings of fact and conclusions of law are required under Rule 52 of the Federal Rules of Civil Procedure.

Issues are drawn whenever an answer is filed. A case may be terminated without trial by reason of default, dismissal, or summary judgment. Findings of fact and conclusions of law are not required under such circumstances. The decision of the Circuit Court of Appeals for the Ninth Circuit is in conflict with the decisions in many other circuits.

Bushwick-Decatur Motors, Inc. v. Ford Motor Co.,
(C. C. A. 2) 116 F. (2d) 675;

Thomas, et al., v. Peyser, et al., (U. S. Ct. App.
D. C.) 118 F. (2d) 369, 374;

Milcor Steel Co. v. George A. Fuller Co., et al.,
(C. C. A. 2) 122 F. (2d) 292 (affirmed 316
U. S. 143);

Farley v. Abbetmeier, et al., (U. S. Ct. App. D. C.) 114 F. (2d) 569;

Lucking v. Delano, (U. S. Ct. App. D. C.) 122 F. (2d) 21, 22;

Somers Coal Co. v. United States, (U. S. D. C. Ohio) 6 F. R. S. 546;

Prudential Insurance Co. of America v. Goldstein, 43 Fed. Supp. 767.

The decision rendered in the instant case by the Circuit Court of Appeals is in actual conflict with the decision of the same Court in *Piantadosi v. Loew's Inc.*, 137 F. (2d) 534, since in that case a summary judgment was granted by the trial Court, no findings were lodged, and the summary judgment was affirmed.

2. The Circuit Court of Appeals erred in disregarding—

“* * * the admissions resulting from the failure of plaintiffs to serve upon defendants a sworn statement denying that matters on which admissions were requested” (quoted language from summary judgment of trial Court).

Rule 36(a) and (b) specifies the manner in which requests for admissions may be answered and used. It has been repeatedly held that failure to deny a request (as in this case) constitutes an admission.

Smyth v. Kaufman, et al., 114 F. (2d) 40 (C. C. A. 2);

Adventures in Good Eating, Inc. v. Best Places to Eat, Inc., (C. C. A. 7) 131 F. (2d) 809;

Walsh v. Connecticut Mutual Life Insurance Co. of Hartford, Conn., 26 Fed. Supp. 566;

Merriman v. Broderick, 38 Fed. Supp. 13.

3. The Circuit Court of Appeals erred in reversing the judgment of the trial Court without considering the showings of the prior patents which were before the trial Court and to which many of the requests for admissions were directed. The judgment of the trial Court stated that “* * * exhibits of prior patents filed with the motion for summary judgment” were considered.

The trial Court had an opportunity of hearing arguments, had observed the conduct of the parties, and had considered all of the facts presented. The judgment of the trial Court should not be disturbed unless the decision of the trial Court is clearly erroneous. No such error appears here.

United States v. McGowan, et al., (C. C. A. 9) 62 F. (2d) 955, 957, (affirmed 290 U. S. 592).

4. The Circuit Court of Appeals erred in holding that there is no warrant for a summary judgment within Rule 56(b) and (c) of the Federal Rules of Civil Procedure where

(a)—issues are drawn by the pleadings, and

(b)—affidavits in opposition have been filed.

This ruling effectively emasculates Rule 56 and in effect deprives litigants of the salutary provisions of this rule. That the Circuit Court of Appeals is in error is evident from the fact that Rule 56(c) provides for opposing affidavits and states:

“The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

The trial Court found that there was no genuine issue as to any material fact. The only affidavit in opposition was filed without leave of Court, after hearing on the motion, and flagrantly violated the requirements of Rule 56(e). The trial Court had the right to disregard this opposing affidavit for reasons stated in Rule 56(e).

The rule which permits parties to terminate litigation by motion for summary judgment should not be emasculated. As stated by Circuit Judge Clark (C. C. A. 2):

"In my judgment, the summary judgment will lose much of its usefulness, will be in effect little more than the old demurrer, if a 'genuine issue' is discoverable when, as here, the full and complete affidavits of the parties show no basis upon which a plaintiff's verdict could be sustained." (Bushwick-Decatur Motors, Inc. v. Ford Motor Co., 116 F. (2d) 675, 679.)

5. The Circuit Court of Appeals erred in stating that—

"* * * it was an abuse of the Court's discretion so to strike the answer"

(which answers were filed by plaintiffs below without leave of Court, many weeks after they were due and after hearing upon the motion for summary judgment was had).

Judicial discretion is that authority which must be exercised to properly and duly conduct trials and other Court proceedings. Such discretion must not be arbitrary or exhibit perversity of will but should be prudent, circum-spect and guided by law.

The trial Court was guided by the Federal Rules of Civil Procedure. Rule 36 states the requirements; plaintiffs below did not fulfill these requirements. The answers

were not filed within the required time, they were not filed within a "further time as the Court may allow on motion and notice." A trial Court does not abuse its discretion by adhering to the rules as provided by the Supreme Court of the United States.

Conclusion.

Litigants as well as counsel should be able to avail themselves of the provisions of the Federal Rules of Civil Procedure, to the end that litigation be brought to a speedy conclusion. Conflicting interpretations have been placed upon certain rules. The Supreme Court of the United States, having fostered and adopted the rules, has the supervisory capacity and duty to enforce and interpret the rules.

It is respectfully urged that procedure will be expedited and rendered uniform by deciding the question presented in the instant case. The facts and the law require a reversal of the judgment of the Circuit Court of Appeals.

Respectfully submitted,

CASIMIR A. MIKETTA,

Attorney for Petitioners.

Service of the within and receipt of a copy
thereof is hereby admitted this.....day of
August, A. D. 1945.
